

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2015030823

DECISION

Los Angeles Unified School District filed a due process complaint with the Office of Administrative Hearings, State of California, on March 16, 2015, naming Student.

Administrative Law Judge Cole Dalton, Office of Administrative Hearings, State of California, heard this matter in Van Nuys, California, on May 19, 2015.

Mary Kellogg, Attorney at Law, represented District. Maria Espinoza, District Due Process Specialist and Phillip Okonma, District Intern, were also present. Student's mother (Parent) appeared on behalf of Student. A Spanish language interpreter was present to interpret the proceedings for Parent. Student was not present during the hearing.

During the Prehearing Conference of April 3, 2015, Student's motion to continue was granted for good cause. At the conclusion of the hearing, OAH granted the parties' request for continuance to May 27, 2015, to submit written closing briefs, which the parties timely did.

ISSUES¹

1. May District conduct assessments of Student pursuant to its January 26, 2015 assessment plan, or else Parent forego the right to District's provision of special education to Student?

SUMMARY OF DECISION

District met its burden of proof on the issue of its right and legal obligation to conduct assessments in the areas of health and development, intellectual capacity and cognitive development, academics, speech and language, occupational therapy, social-emotional development and a functional behavior assessment. District's assessment plan was appropriate, its assessors qualified and the assessments necessary to obtain information regarding Student's present levels of performance, areas of unique need, and strategies to assist Student as he transitions to a full time school program and to middle school. District may assess Student pursuant to its proposed assessment plan over Parent's objection.

FACTUAL FINDINGS

Jurisdiction and Background

1. At the time of hearing Student was a 10-year-old male, in fifth grade, receiving special education services under the eligibility category of autism. Student lived with Parent within the jurisdictional boundaries of Los Angeles Unified School District at all times relevant to the issues for hearing. Student attended Corona Avenue Elementary School for two hours per day. District provided applied behavior analysis behavior intervention services through a non-public agency for an additional two hours per day, in the home.²

2. Student's initial psychoeducational evaluation occurred in March 2008. District's latest assessments of Student include a psychoeducational evaluation dated October 10, 2011, an occupational therapy assessment report dated October 17, 2012, and a speech and language assessment report dated January 31, 2013. His last health assessment was more than three years ago. Student also received independent educational evaluations consisting

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 442-443.)

² In its August 28, 2014 IEP, completed October 27, 2014, District offered Student a full day placement in an autism special day class with supports and services in behavior, occupational therapy and speech and language therapy. However, Parent has not consented to implementation of the IEP.

of a psychoeducational evaluation dated January 27, 2013, and a speech and language evaluation dated March 16, 2014.³

3. District sought comprehensive reassessments to determine Student's unique needs for transition to middle school and back to a full school day program.

District's January 26, 2015 Assessment Plan

4. On January 26, 2015, Special Education Administrator Anna Barraza sent Parent a cover letter, District's assessment plan, and notice of procedural rights and safeguards, in Parent's native language of Spanish. Ms. Barraza's letter explained that comprehensive assessments were necessary to determine if a change in Student's program and services was needed and because District had not conducted a comprehensive triennial review of Student in all areas of suspected disability within the past three years.

5. District's assessment plan sought consent for evaluations in the areas of health and development, including vision and hearing tests by a school nurse; general capacity or cognitive development by a school psychologist; academics by a special education teacher; language development by a speech language pathologist and school psychologist; fine and gross motor development by an occupational therapist; and social-emotional development and a functional behavior assessment by the school psychologist and special education teacher.

6. Student's attorney, Heather Zakson, sent a letter to District dated January 29, 2015, acknowledging Parent's receipt of the assessment plan but she claimed that triennial assessments were not due until 2016. In letters written between Ms. Zakson and Ms. Barraza in January and February 2015, Ms. Zakson opined that the psychoeducational independent educational evaluation, done in January 2013, was the District's last triennial. Ms. Barraza responded that the IEE was over two years old and District's own psychoeducational evaluation over three years old. Further, she reiterated District's position that District needed new assessments to determine whether a change to Student's educational program and/or services was needed. Parent did not consent to the January 26, 2015 assessment plan.

Necessity and Appropriateness of Assessments

7. Ms. Barraza holds a bachelor of arts in child development, a master of arts in special education and in education administration, and clear and current teaching credentials in multiple subjects and mild to moderate special education. She has been employed by District for several years and attended approximately 200 individualized education program team meetings over the past six to seven years. As assistant principal at Student's school,

³ Though the assessment report was not presented as evidence at the hearing, the speech and language assessment was identified in Student's IEP of August 28, 2014.

Ms. Barraza acts as the school site support administrator who attends Student's IEP team meetings.

8. Ms. Barraza outlined District's reasons for needing comprehensive assessments of Student. Student currently attends elementary school until 10:00 a.m. and receives District behavior intervention services at home for approximately two hours per school day. Recess begins at 10:30 a.m. As such, Student misses several social interaction opportunities during the school day and has many deficits in this area. Assessments are needed to obtain a better understanding of Student's needs, to prepare for his transition to middle school and to transition Student to a full day school program.

9. Student's psychoeducational independent educational evaluation of January 27, 2013, was based on a 30-minute home observation on November 27, 2012, and direct testing on December 7, 2012. The examiners did not observe Student in his school program and did not perform academic testing. In the report, the assessors state that caution should be used when interpreting results beyond a 12-month time period.

10. Ms. Barraza explained that District planned to have a credentialed school psychologist perform a comprehensive psychoeducational evaluation of Student to observe Student in his home program, during classroom instruction, on the playground, during recess and lunch. A District credentialed special education teacher would conduct the academic assessment to determine Student's current levels of academic functioning. In conjunction, the two assessments would provide District with input on how Student learns and his educational needs, to develop an appropriate middle school program for him and to plan for his transition back to school, full time. A functional behavior analysis would provide updated information for Student's behavior support plan. Ms. Barraza expressed concern over transitioning to a different school with a much different environment, in light of Student's autism and adaptability issues. District also wanted to assess Student's sensory and fine motor needs by a certified occupational therapist and his communication needs by a certified speech language pathologist.

11. Samuel Contreras works with Student in an autism special day class, which Student attends two hours per school day. Mr. Contreras has taught for 15 years and holds a clear and current special education teaching credential. His knowledge of Student's present levels of performance and academic needs has been limited by Student's minimal hours of attendance, but his credibility was not affected by his limited knowledge. During class time, Student also received either push-in or pull-out services in occupational and speech and language therapy, further cutting into his academic program.

12. Student is able to grasp a pencil fairly well but is below age level in writing. He is able to trace letters. Occupational therapy testing would provide insight into what Student is capable of doing in the classroom and identify strategies for the teacher to work with Student when the occupational therapist is not present. Academic testing is needed to determine academic readiness, self-help skills and how to aid Student's interaction with peers.

13. When asked to do tasks in the classroom, Student protests and requires edible rewards for follow through. Student also gets up out of his seat, walks around the room, and sometimes gets physically aggressive with his behavior intervention aide. An updated functional behavior assessment would better determine what triggers Student and what rewards are effective for him.

14. Student has significant communication deficits. According to the notes of the August 28, 2014 IEP, an independent speech and language assessment by Shaun Howell, dated March 16, 2014, resulted in findings of severe verbal apraxia affecting Student's speech production skills and severe receptive vocabulary deficits. Student was unable to participate in most standardized testing.

15. Parent is protective and concerned over the wellbeing of her son. She agreed that he has needs in the areas of autism, communication, behavior, social-emotional functioning, and occupational therapy. She confirmed that he has aggressive behaviors including tantrums and that he can be hyperactive. She had concerns over his safety and security.

16. Parent generally did not object to the idea that Student could come back to school for more than two hours per day. She also did not disagree that District would need assessments to determine Student's needs in order to facilitate his transition back to school full time. Her primary objection was the timing of the assessments.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)⁵ et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. § § 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C) and (D).) At the hearing, the party filing the complaint has the burden of

persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, District has the burden of proof on all issues.

Issue 1– District’s Right to Conduct Assessments Over Lack of Parental Consent

5. District contends that it had the right and obligation to assess Student when it presented its proposed assessment plan to Parent, but it could not do so because Parent refused to consent. Parent claimed at hearing that triennial evaluations are not due until next year and she will not provide consent for any new assessments until that time.

DISTRICT PROVIDED PROPER NOTICE OF ASSESSMENTS

6. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the local educational agency “determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment.” (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

7. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

8. District met its burden of persuasion through credible testimony from Ms. Barraza that it complied with all statutory requirements regarding its assessment plan. On January 26, 2015, District sent Parent its assessment plan with a cover letter explaining that assessments were needed in order to develop an appropriate IEP for Student. The assessment plan, cover letter and notice of procedural rights were sent in Parent’s native language of Spanish. The assessment plan identified all areas District proposed to assess. The evidence showed that District made reasonable efforts to obtain parental consent to the assessment

plan and provided at least 15 days to review and sign the plan. Parent acknowledges receipt of the assessment plan but has not provided consent.

REASSESSMENT OF STUDENT IS WARRANTED

9. If parents do not consent to a reassessment plan, a school district may conduct the reassessment by showing at a due process hearing that it needs to reassess student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

10. Parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice, and cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79 (*Andress*); *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315 (*Gregory*).) “Every court to consider the [Individuals with Disabilities Act’s] reevaluation requirements has concluded that “if a student’s parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student . . .” (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160, quoting *Andress* at p. 178-179.) The Ninth Circuit has held that “if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit [re-assessment] testing.” (*Gregory* at p. 1315.)

11. Here, Parent relied on the August 28, 2014 IEP to support her belief that the triennial evaluation was not due until 2016. Parent’s counsel, who did not represent Student at hearing, took the position that the psychoeducational IEE of January 27, 2013, was the triennial evaluation. Parent offered no credible evidence to refute District’s position that it was entitled to conduct its own assessments and not rely solely on an IEE from two years prior. Further, the IEE did not include academic testing, a health assessment, speech and language assessment or occupational therapy assessment.

12. District credibly proved that it has not conducted assessments in areas covered by the assessment plan within the past year and that assessments are warranted to address Student’s transition to middle school and to a full time school program. Given Student’s numerous and varied deficits in speech and language, fine motor skills, sensory needs, social-emotional and self-help skills and socialization, and his limited time in the school setting, District is within its legal rights and obligations to conduct such assessments to determine his present levels of performance and whether he needs additional or different related services and supports. The date identified in the August 28, 2014 IEP for the triennial review was irrelevant to the determination of District’s right to assess.

13. Parent agreed that Student’s transition back to school would need to be based upon his needs as identified in assessments. Although Parent expressed concern over District assessing Student’s eligibility for special education, District did not express concern over eligibility issues as a reason for assessing Student.

14. District has demonstrated by a preponderance of the evidence that it needs more current, specific information on Student's learning style, present levels of performance and unique needs in order to develop strategies to work with Student in coming back to school full time, engaging with peers and staff more appropriately and transitioning to middle school. District has not performed any of the assessments sought within the past year and is entitled to do so.

DISTRICT ASSESSORS ARE KNOWLEDGEABLE AND COMPETENT

15. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

16. Assessments shall be conducted by individuals who are "knowledgeable of the student's disability" and "competent to perform the assessment," as determined by the local educational agency. (Ed. Code, § 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) Psychological and health assessments shall be performed in accordance with the procedures set forth in Education Code section 56320, by assessors who are trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56324.) Any psychological assessment of a pupil shall be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a)). Any health assessment of a pupil shall be performed by a credentialed school nurse or physician. (Ed. Code, § 56324, subd. (b).)

17. District's proposed assessor for cognitive development, social-emotional development and behavior is a credentialed school psychologist. A credentialed school nurse would perform the health assessment. The remaining assessments would be completed by a credentialed special education teacher, certified speech language pathologist, and certified occupational therapist, in their areas of expertise. No concern over the assessors' ability to

conduct assessments in accordance with the assessment procedures in Education Code section 56320 was presented at hearing.

18. District established that the January 26, 2015 assessment plan complied with all applicable statutory requirements regarding form, function and notice. District also established that assessments are warranted and its assessors are competent to perform them. Therefore, District may assess Student over parental objection.

ORDER

1. District is entitled to proceed with the assessments proposed in the January 26, 2015 assessment plan over Parent's objection.

2. District shall, within 10 business days of the date of this decision, deliver to Parent by certified mail at her last known address, notice of the dates, times, and locations of the assessments identified in the January 26, 2015 assessment plan. Parent shall present Student for the assessments on the dates, times, and at the locations set by District. If Student is unable to attend on those days, Parent will promptly communicate this to District and the parties will mutually agree on days and times for the assessments that are no more than 30 days from the dates that District originally proposed.

3. Parent will timely complete and return any paperwork reasonably requested by District as part of the assessments.

4. If Parent does not present Student on the days and times as specified above or does not complete any paperwork as specified above, District will not be obligated to provide special education and related services to Student until such time as Parent complies with this Order.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on the only issue heard and decided in this matter.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: June 19, 2015

_____/s/_____
COLE DALTON
Administrative Law Judge
Office of Administrative Hearings